SUPREME COURT, U. S.
Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-813

CITY OF CHICAGO, A MUNICIPAL CORPORATION; AND JOHN MULCHRONE, HARRY ERVANIAN, JOHN MEADE, ROBERT KUKOWINSKI, DAVID PURTELL, CHARLES KOLUDROVIC AND JOHN SADUNAS,

Petitioners,

vs.

IBERIA HAMPTON, ADMINISTRATRIX OF THE ESTATE OF FRED A. HAMPTON, DECEASED; FANNIE MAE CLARK, ADMINISTRATRIX OF THE ESTATE OF MARK CLARK, DECEASED; VERLINA BREWER, BY HER NEXT FRIEND, WILLIAM R. BREWER; AND DEBORAH JOHNSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CITY OF CHICAGO, A MUNICIPAL CORPORATION; AND JOHN MULCHRONE, HARRY ERVANIAN, JOHN MEADE, ROBERT KUKOWINSKI, DAVID PURTELL, CHARLES KOLUDROVIC AND JOHN SADUNAS,

Petitioners,

vs.

IBERIA HAMPTON, ADMINISTRATRIX OF THE ESTATE OF FRED A. HAMPTON, DECEASED; FANNIE MAE CLARK, ADMINISTRATRIX OF THE ESTATE OF MAE CLARK, DECEASED; VERLINA BREWER, BY HER NEXT FRIEND, WILLIAM R. BREWER; AND DEBORAH JOHNSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners City of Chicago, John Mulchrone, Harry Ervanian, John Meade, Robert Kukowinski, David Purtell, Charles Koludrovic, and John Sadunas respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on August 24, 1973.

OPINIONS BELOW.

The Opinion of the Court of Appeals, filed on August 24, 1973, has not yet been officially reported, but it is reproduced in Appendix B to this Petition.

The Memorandum Opinion and Orders of the District Court are reported at 339 F. Supp. 695 (N. D. Ill., 1972), and are reproduced in Appendix A to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 24, 1973 (Appendix B). On September 18, 1973, the Court of Appeals denied a motion to stay the mandate.

The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

The jurisdiction of the District Court was invoked under the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution, under 42 U. S. C., §§ 1981, 1982, 1983, 1985, 1986 and 1988, and under 28 U. S. C., §§ 1331 and 1343. In the case of Plaintiff Verlina Brewer, who is a resident of the State of Michigan, diversity jurisdiction was also invoked under 28 U. S. C., § 1332.

QUESTIONS PRESENTED.

1. Whether perjury constitutes a cause of action under the Federal Civil Rights Act.

2. Whether the intervening action of a grand jury obviates any action for alleged damages from continued prosecution thereafter.

3. Whether the Plaintiffs alleged a cause of action for conspiracy under the Federal Civil Rights Act (42 U. S. C., §§ 1983, 1985(3)) against the Chicago police officers who did not participate in the execution of the search warrant.

4. Whether the Court of Appeals misapprehended the present status of Illinois law concerning municipal immunity from liability for the wilful and wanton acts of public employees.

FEDERAL STATUTES INVOLVED.

UNITED STATES CODE, Title 42.

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1985. Conspiracy to Interfere with Civil Rights—Preventing Officer from Performing Duties.

* * * * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein, do, or cause to be done, any act in furtherance of the object of such con-

spiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE.

Four civil rights cases arose from events surrounding an attempt by 14 police officers to execute a search warrant at an apartment in Chicago occupied by members of the Black Panther Party. On the date in question, these 14 Chicago police officers were assigned to duty with the office of the State's Attorney of Cook County, Illinois. The various complaints alleged civil rights violations by the 14 officers who actually participated in the events that took place at the apartment in the early morning of December 4, 1969, which events resulted in the death of Mark Clark and Fred Hampton and in the injury of some of the occupants, all of whom were arrested. The complaints also alleged violations against the then State's Attorney, Edward Hanrahan, several of Hanrahan's assistant state's attorneys, the City of Chicago, the County of Cook, the Mayor of the City of Chicago, and the Superintendent of the Chicago Police Department. Finally, two of the complaints alleged civil rights violations by seven Chicago police officers and two assistant state's attorneys who were involved only in subsequent investigations and laboratory tests. These seven police officers and the City of Chicago are the petitioners herein.

In the District Court, all defendants filed motions to dismiss. The court granted the motions of all defendants, except those of the 14 police officers who went to the apartment to execute the search warrant.

On appeal, the Seventh Circuit Court of Appeals affirmed the District Court's dismissal of defendants City of Chicago and the County of Cook in three of the cases but held they were to be retained as defendants in the Brewer case which contained allegations of state tort claims under diversity jurisdiction as well as allegations of federal civil rights jurisdiction. In so holding,

the Court found that Illinois law affords the City and County no immunity from liability for wilful and wanton acts of their employees. Petitioner City of Chicago herein challenges that portion of the Court of Appeals' opinion.

The Court of Appeals also affirmed the lower court's dismissal of the Mayor of Chicago and the Superintendent of the Chicago Police Department because none of the complaints alleged any actual knowledge or participation on the part of either person.

However, the Court of Appeals reversed the dismissal of the State's Attorney and one of his assistants (Hanrahan and Jalovec), holding that the complaints alleged acts, which if true, would be beyond the protections of quasi-judicial immunity usually afforded such prosecutorial officers.

The Court of Appeals further held that the complaints of Deborah Johnson and Verlina Brewer sufficiently stated a cause of action for conspiracy under 42 U. S. C. § 1985(3) against seven Chicago police officers who allegedly were involved in the subsequent investigation of the events of December 4, 1969, as well as against two assistant state's attorneys (Sorosky and Meltreger) who also allegedly participated in the subsequent investigatory procedures.

The correctness of this latter ruling of the Court of Appeals is challenged in this Petition by those seven police officers, who are: Deputy Superintendent Mulchrone, who had supervisory responsibility for the Internal Inspections Division (IID) of the Chicago Police Department; Captain Ervanian, Director of the IID; Sergeant Meade, who was in charge of the IID's investigation of the events in question; Lieutenant Kukowinski, head of the Excessive Force Unit of the IID; David Purtell, Director of the Crime Laboratory; Sergeant Koludrovic, supervising officer of the Crime Laboratory's mobile unit; and John Sadunas, firearms examiner in the Crime Laboratory.

REASONS FOR GRANTING THE WRIT.

I.

THE OPINION OF THE COURT OF APPEALS EXPANDS THE FEDERAL CIVIL RIGHTS ACT TO INCLUDE PERJURY, WHICH PLACES THE SEVENTH CIRCUIT IN CONFLICT WITH THE EIGHTH CIRCUIT, AS WELL AS OTHER FEDERAL COURTS.

The complaints of Johnson and Brewer allege a conspiracy to commit perjury by the seven petitioning police officers for the alleged purpose of false arrest and imprisonment of Plaintiffs. The Seventh Circuit Court of Appeals, without citing a single authority, held that such a charge of conspiracy to commit perjury, "tenuous" as it admittedly was (Appendix B, p. A23), was actionable under 42 U. S. C., § 1985(3). (Part 2 of Opinion, Appendix B, pp. A21 et seq.)

This opinion is in direct conflict with the Eighth Circuit's decision in *Edwards* v. *Vasel*, 349 F. Supp. 164 (E. D. Mo. 1972), *aff'd per curiam*, 469 F. 2d 338 (1972). In *Edwards*, the complaint alleged that a police officer falsified his testimony at a habeas corpus hearing. The Eighth Circuit held that such a charge was not actionable in a civil rights damage suit, stating (at 166):

> "[W]e do not believe that a witness who allegedly testifies falsely does so under color of law, as that term is used in the civil rights statute, whether or not the witness is a police officer."

The Court concluded (at 166) that in testifying, a witness, even if he is a police officer, is not using his official capacity. Finding no action under color of state law, the Court dismissed the cause as nonactionable under 42 U. S. C. § 1983.

Equally irreconcilable with the Seventh Circuit's opinion in the case at bar is the opinion of the District Court in *Symkowski*

v. *Miller*, 294 F. Supp. 1214 (Wis. 1969). In *Symkowski*, an accused was put through two criminal proceedings before his case resulted in acquittal. Subsequently, he brought a civil rights suit based on allegations of false testimony by police officers during his criminal trials. The District Court, in summarily dismissing the case, stated (at 1216):

> "No case has been suggested to this court, and this court has found none, in which acquittal in a criminal trial nonetheless provided the grounds for a civil action for the deprivation of constitutional rights of the party acquitted."

The Court went on to note (at 1217) that all of the cases it had been able to find require

> " . . . that the state *knowingly* use such perjured testimony in order to obtain a conviction before such perjury can be considered a violation of the constitutional rights of the person against whom it was used. Hysler v. Florida, 315 U.S. 411, 62 S. Ct. 688, 86 L. Ed. 932 (1942); White v. Ragen, 324 U.S. 76, 65 S. Ct. 978, 89 L. Ed. 348 (1945); United States ex rel. O'Connell v. Ragen, 212 F. 2d 272 (7th Cir. 1954), cert. denied, 348 U.S. 847, 75 S. Ct. 71, 99 L. Ed. 667." (Emphasis in the original)

Absent a knowing use of perjured testimony plus a resulting conviction, the District Court found no actionable damage.

To the same effect is the result in *Grisom* v. *Logan*, 334 F. Supp. 273 (D. C. Cal. 1971), wherein plaintiff alleged that falsified evidence was presented at her preliminary hearing.

The Court stated (at 277):

> "Before a cause of action for denial of due process arises under 42 U. S. C., § 1983, there must, in fact, have been such a denial. United States ex rel. McNeill v. Tarumianz, 141 F. Supp. 739 (D. Del. 1956)."

The Court concluded that since charges were dropped after her preliminary hearing, no actionable damages existed under § 1983. (See 334 F. Supp. at 227, citing *Symkowski* v. *Miller*, *supra*.)

In the case at bar, Plaintiffs allege that Petitioners Sadunas, Koludrovic, and Purtell, all members of the Crime Laboratory, gave false testimony to a coroner's jury or filed a false firearms report. In the case of Petitioner Sadunas, Plaintiffs allege that he gave false testimony to a grand jury (Appendix B, p. A22). It is further alleged that Petitioners Mulchrone, Ervanian, Meade, and Kukowinski limited the scope of their IID investigation. (Appendix B, p. A22).

Although the January, 1970, grand jury indicted the Plaintiffs herein, the charges against them were subsequently dropped in May, 1970. The Plaintiffs not only were never convicted as a result of any alleged perjured testimony or falsified evidence, they were never even tried. In fact, under Illinois law, an indictment in a criminal prosecution is merely a pleading. *People* v. *Snyder*, 117 N. E. 119 (Ill. 1917).

Therefore, under the lack of color of state law rationale of the Eighth Circuit's decision in the *Edwards* case *supra*, and the lack of a conviction test in the *Symkowski* case *supra*, Plaintiffs have no federal civil rights damage suit for conspiracy to commit perjury against Petitioners.

Obviously, the Seventh Circuit Court of Appeals' decision to the contrary in the case at bar creates a conflict between it and the Eighth Circuit Court of Appeals and highlights a divergent line of reasoning by a District Court within its own Circuit and other federal district courts. In fact, although courts agree on the general rule that a prisoner convicted by false testimony has a civil rights action for violation of due process (*Miller* v. *Pate*, 386 U. S. 1, 7 (1966)), Petitioners have been unable to find any decision other than the decision herein in which a person who has been acquitted or who has had all charges dropped also can claim damages for violation of his federal civil rights by reason of perjury.

II.

THE DECISION OF THE CIRCUIT COURT WOULD PERMIT RECOVERY AGAINST INDIVIDUAL DEFENDANTS FOR ALLEGED DAMAGES ACCRUING AFTER PLAINTIFFS' INDICTMENT IN CONTRAVENTION OF THE CIRCUIT COURT'S OWN DECISION IN DUNCAN v. NELSON.

The opinion of the Circuit Court holds that the seven petitioning police officers may be tried on charges of limiting investigations and falsifying laboratory tests for the purposes of concealing "the fact that there was no basis for arresting, holding or prosecuting the plaintiffs, and that the continuing concealment aggravated plaintiffs' injuries." (Appendix B, p. A22).

Thus, the seven petitioning police officers are charged only with a conspiracy to commit perjury to aggravate plaintiffs' injuries by prolonging the prosecution of plaintiffs. However. indictment by the grand jury was the operative fact that continued the prosecution of plaintiffs until the state's attorney's office decided to enter a *nolle prosequi.*

The decision of the Circuit Court that the petitioning police officers could be liable in such an instance, in spite of the intervening action of the grand jury, is in derogation of its own decision in *Duncan* v. *Nelson,* 466 F. 2d 939 (7th Cir. 1972), *cert. denied,* 409 U. S. 894 (1972).

In *Duncan,* a civil rights suit was brought against police officers for alleged damages resulting from a coerced confession, conviction, and incarceration. Although the Court held that a cause of action existed for the coercion of the confession, it ruled there was no cognizable action against the police officers for Duncan's conviction and incarceration. The intervening action of the trial court precluded liability on the part of the police officers for damages arising from conviction and incarceration. In so holding, the *Duncan* Court reasoned that even if defendants could have foreseen the admission of the coerced confession at Duncan's trial, there was the real possibility that

Duncan may have been convicted at his original trial without the use of that evidence. Thus, it could not be concluded that the defendants who allegedly coerced the confession were the proximate cause of Duncan's conviction and incarceration.

Congruently, in the case at bar, indictment by the grand jury is a superseding, intervening cause that shields the police officers from any liability for allegedly prolonging Plaintiffs' prosecution. Presumably, the results of the events that took place on December 4, 1969, were sufficient to bring forth indictments for attempted murder and aggravated battery. Furthermore, there is no allegation that any activity on the part of the seven petitioning officers was the proximate cause of the indictment.

Thus, Seventh Circuit's opinion in the case at bar is irreconcilable with its own rationale in *Duncan* v. *Nelson, supra.*

III.

SUPERVISION IS REQUIRED BY THIS COURT TO PREVENT THE TRIAL OF PERSONS AGAINST WHOM NO CAUSE OF ACTION IS STATED AS A MATTER OF FACT.

For purposes of argument herein, it has been assumed that the allegations in the complaints are true. However, the two complaints in which the seven petitioning police officers are named as defendants contain absolute contradictions of fact which require the dismissal of those Petitioners as parties defendant.

In those two complaints, the following identical allegations appear:

> "Defendants Groth, Broderick, Carmody, Ciszewski, Corbett, Davis, Gorman, Harris, Howard, Hughes, Jones, Joseph, Kelly, and Marusich, in violation of normal investigating procedures, prohibited the evidence technicians from the Task Force and the Mobile Crime Lab of the Chicago Police Department from gathering evidence until

> the above-named defendants had picked up many items themselves; said procedure was adopted by defendants in order to obscure the true nature of their brutal and murderous conduct during the raid on the apartment." (Brewer Complaint, par. 62(b); Johnson Complaint, par. 69(b)).
>
> "Defendant Hanrahan, acting through Defendant Jalovec, or others not presently known to the Plaintiff, did purposely obstruct the analysis of evidence by the Crime Lab of the Chicago Police Department by withholding from the Crime Lab the weapons used by the Defendant State's Attorney's police on the raid on December 4, 1969, and did thereby assist defendants Purtell and Sadunas in producing an incomplete, false and erroneous firearms report that misled the public into believing that Brenda Harris, an occupant of the apartment, had fired at the Defendant State's Attorney's police, thereby justifying the continuation of the unfounded prosecution of Plaintiff." (Brewer Complaint, par. 62(u); Johnson Complaint, par. 69(u)).

Taking all allegations as true, which must be the assumption for purposes of a motion to dismiss, it is obvious that on the basis of the foregoing pleadings, Plaintiffs can prove no set of facts that would result in liability for false testimony or evidence on the part of these Petitioners. If a person is never in possession of all the evidence or facts, he cannot be held liable for an incomplete report. Thus, to accuse the 14 police officers who participated in the so-called raid of actively removing evidence before the entrance of the Task Force from the IID and the Crime Laboratory, and then to turn around and posit liability on the part of the seven police officers connected with the Task Force and Crime Laboratory based on factors admittedly beyond their control is fundamentally faulty. Clearly, on the face of the complaints, Plaintiffs have by their own pleadings failed to state a cause of action for concealment against these Petitioners. What one does not possess, one cannot conceal. By the same token, there could be no knowing use of perjured testimony that could have given rise to liability if convictions had been obtained. See *Symkowski* v. *Miller*, 294 F. Supp. 1214, 1216-17 (D. C. Wis. 1969).

Justice Demands that these Petitioners, who by Plaintiffs' own acknowledgment from the very beginning were prevented full access to the alleged evidence available, should be dismissed as defendants in the case at bar. It is true that the complaints in the case at bar were voluminous (total of 134 pages) (Appendix A, p. A3); however, Petitioners submit that our system of jurisprudence does not condone prosecution as a result of confusion.

IV.

THE COURT OF APPEALS ERRED IN ITS READING OF ILLINOIS CASES CONCERNING THE STATE'S TORT IMMUNITY ACT.

In Part 4 of its opinion, the Court of Appeals held that Counts 13, 14, and 15 of the Brewer complaint (with diversity jurisdiction) sufficiently alleged common law torts of assault and battery, false imprisonment, and malicious prosecution against the Petitioner City of Chicago and the County of Cook (Appendix B, pp. A24-A25). The Court based its finding of municipal liability on its reading of three Illinois cases, from which it concluded:

> "As we read those cases, it now seems quite clear that the Illinois statute does not immunize municipal corporations from liability if their agents are guilty of wilful and wanton misconduct." (Appendix B, p. A25)

The District Court, however, reached a contrary conclusion to the effect that the City and the County could avail themselves of the immunity defenses contained in the Illinois Tort Immunity Act (Ill. Rev. Stat. 1965, ch. 85, pars. 1-101, *et seq.*). *Hampton* v. *City of Chicago, Cook County, Illinois,* 339 F. Supp. 695, 697, 698 (Appendix A, p. A4).

Petitioner City of Chicago submits that the Court of Appeals erred in its conclusion as a result of reading the three cases cited. In the first case it cites—*Mills* v. *County of Winnebago,* 244 N.E. 2d 65 (2d District, 1969)—the Illinois Appellate

Court held that the Tort Immunity Act precluded a cause of action against the County of Winnebago for the wilful and wanton acts of one of its deputy sheriffs.

In the second case cited—*Arnolt* v. *City of Highland Park*, 282 N.E. 2d 144 (1972)—the Illinois Supreme Court ruled that, notwithstanding the Tort Immunity Act, a cause of action could be maintained against the City of Highland Park for negligent conduct of one of its police officers, when such conduct did not occur during an attempt to enforce or execute any law.

And in the third case cited by the Court of Appeals—*Krieger* v. *Village of Carpentersville*, 289 N.E. 2d 481 (2d District, 1972)—damages were sought for events that occurred in 1963, two years prior to the enactment of the present Illinois Tort Immunity Act. Thus, no guidance as to the interpretation of the present immunity law in Illinois can be gleaned from this case.

If anything, these three unrelated cases together stand only as early statements in a developing body of tort immunity case law in Illinois. Petitioner City of Chicago, therefore, submits that the Court of Appeals was mistaken in its pronouncement that these three cases stand for the proposition that, without more, a municipality is liable for the wilful and wanton acts of its employees.

V.

THE CASE IS RIPE FOR REVIEW.

The position of Petitioners in the case at bar presents issues fundamental to the further conduct of this case. Thus, even though the present status of the matter is on remand to the trial court, it is ripe for review by this Court. *Land* v. *Dollar*, 330 U.S. 731, at 734, n. 2 (1947); *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, at 685, n. 3 (1949).

This Court has felt compelled to grant the writ for purposes of resolving conflicts between circuits. *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 291, 79 S. Ct. 756, 3 L. Ed. 2d 815 (1959); *F.T.C.* v. *Flotill Products, Inc.*, 389 U.S. 179, 181, 88 S. Ct. 401, 19 L. Ed. 2d 398 (1967). And, in the case at bar, Petitioners are required to seek the writ, lest this erroneous decision become the law of the case upon remand and any appeal following remand. See *D.C. Federation of Civic Associations* v. *Volpe*, 459 F. 2d 1231, 1267 (C.A.D.C. 1972).

Furthermore, in the case at bar, novel and important questions of law are presented, to-wit: Do 42 U.S.C., §§ 1983 and 1985(3), encompass perjury absent a conviction? And what is to be the resolution of the conflict between circuits on this question? Can an individual be held liable for alleged damages accruing as a result of action by a judicial body? If so, has *Duncan* v. *Nelson, supra,* been overruled *sub silentio?*

Equally important is the practical consideration that a favorable ruling would terminate the litigation of the federal claims against the petitioning police officers. Such possibility of termination has also been mentioned by this Court as a reason for granting the writ. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

Finally, and perhaps most unusual for a petition to this Court, the question is presented whether a defendant can be required to stand trial in a case where the pleadings absolve him from any wrongdoing. A negative answer to this unique proposition would remove the petitioning police officers from the unjust position in which they now find themselves.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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November 21, 1973.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

IBERIA HAMPTON, Administratrix on behalf of the Estate of Fred A. Hampton, Deceased, *Plaintiff,* *vs.* THE CITY OF CHICAGO, COOK COUNTY, ILLINOIS, et al., *Defendants.*	
FANNIE MAE CLARK, Administratrix of the Estate of Mark Clark, Deceased, *Plaintiff,* *vs.* THE CITY OF CHICAGO, a Municipal Corporation, et al., *Defendants.*	Nos. 70 C 1384, 70 C 2371, 70 C 3026, 70 C 3029
VERLINA BREWER, by her next friend, William R. Brewer, *Plaintiff,* *vs.* THE CITY OF CHICAGO, a Municipal Corporation, et al., *Defendants.*	
DEBORAH JOHNSON, et al., *Plaintiffs,* *vs.* THE CITY OF CHICAGO, a Municipal Corporation, et al., *Defendants.*	

MEMORANDUM OPINION AND ORDERS

PERRY, *District Judge.*

On October 22, 1971, cases numbered 70 C 1384, 70 C 2371, 70 C 3026 and 70 C 3029 were by agreement and order of this court consolidated. Said cases were ordered to proceed for all purposes thereafter under case numbered 70 C 1384.

These suits are civil actions for damages. Plaintiffs allege defendants committed acts under color of law which deprived plaintiffs of their rights, privileges and immunities as guaranteed by the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and protected under 42 U. S. C. § 1981 et seq.

All four actions grow out of a "raid" by certain Chicago policemen (assigned as State's Attorney's Police) at an apartment located at 2337 W. Monroe Street in Chicago, Illinois, occupied by members of the Black Panther Party, and out of the aftermath of that raid. Plaintiffs allege certain of the defendants herein illegally entered said apartment on December 4, 1969 and assaulted them with deadly weapons, killing Fred Hampton in the presence of plaintiff Deborah Johnson, killing Mark Clark, and causing serious bodily harm to Verlina Brewer, Ronald Satchel, Blair Anderson and Brenda Harris. Plaintiffs Brewer, Johnson, Satchel, Anderson, Harris, Harold Bell and Louis Trueluck further charge they were illegally arrested, falsely imprisoned and prosecuted wrongfully and maliciously. Sued are the Chicago police officers who participated in the raid; certain other police officers assigned to the Crime Laboratory and Internal Inspections Division of the Chicago Police Department; the State's Attorney of Cook County and three Assistant State's Attorneys; the City of Chicago as employer of the police officers; the County of Cook as employer of the state's attorneys; the Mayor of the City of Chicago, and the Superintendent of the Chicago Police Department.

The allegations made in these four suits are voluminous, and the court in this particular memorandum and order will not attempt here to set them forth in detail, nor further attempt to summarize them. The complaint in 70 C 1384 ("the Hampton case") covers 15 pages; in 70 C 2371 ("the Clark case"), 9 pages; in 70 C 3026 ("the Brewer case"), 42 pages; and in 70 C 3029 ("the case of Johnson, et al."), 68 pages.

Various defendants in the various cases have moved to dismiss the complaints wherein they are named for failure to state a cause of action and for lack of jurisdiction. Other motions to extend time to plead and motions to stay discovery have been filed. Plaintiffs have responded to the various motions and defendants have made reply. Following consolidation of the actions, other motions were filed by defendants on November 17, 1971; and on December 15, 1971, plaintiffs filed further answer to various defendants' motions to dismiss in this consolidated cause.

The court has now reviewed the four complaints and has read and considered all the motions and all the briefs and/or memoranda of the parties in support of their respective positions. The court's memorandum and its orders follow:

As to the Motion to Strike and Dismiss of the City of Chicago:

[1] The City of Chicago is a defendant in all four consolidated cases. Jurisdiction is alleged under the Civil Rights Act (42 U. S. C. § 1981 et seq.). The City of Chicago is a municipal corporation and not a "person" within the meaning of the Civil Rights Statute. It is now well established that an action for damages will not lie against a municipal corporation on these jurisdictional allegations. Monroe v. Pape, 365 U. S. 167, 191, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); United States ex rel. Lee v. State of Illinois, 343 F. 2d 120 (7th Cir., 1965); Fisher v. City of New York, 312 F. 2d 890 (2nd Cir., 1963); Spiesel v. City of New York, 239 F. Supp. 106 (S. D. N. Y., 1964); Wilcher v. Gain, 311 F. Supp. 754 (N. D. Cal., 1970).

[2] The civil rights statutes are aimed at individuals who subject others to deprivation of their civil rights and personal involvement is contemplated. They are not aimed at the city which employs them. Plaintiffs seek to hold the city liable here for the acts of its employees under the doctrine of *respondeat superior*. The theory that a municipality is liable for the failure to properly train, discipline, supervise, etc. its employees has been advanced in numerous cases in this court and elsewhere. The theory has been struck down. Salazar v. Dowd, 256 F. Supp. 220 (D. Colorado, 1966); and in this court, Down v. Daley, 69 C 1789; Williams et al. v. Barnes et al., 69 C 1942; Sanberg v. Daley, Mayor of the City of Chicago et al., 306 F. Supp. 277. Additionally, governmental entities have defenses under Chapter 85 Ill. Rev. Stats. (1969).

All of the counts in all four complaints as they relate to the City of Chicago should be stricken and the City should be dismissed from all four suits as a party defendant. It is, therefore, Ordered that the City of Chicago be and it is hereby dismissed as a party defendant in this consolidated case.

As to the Motions to Strike and Dismiss of the County of Cook, Illinois:

[3] As in the case of the City of Chicago, the county is not a "person" within the definition of the Civil Rights Act. Monroe v. Pape and other cases, supra, and Dodd v. Spokane County, Washington, 9th Cir., 393 F. 2d 330.

[4] Plaintiffs, likewise, seek to recover damages against the County of Cook under the doctrine of *respondeat superior* based upon the alleged negligent acts of the State's Attorney of Cook County and certain Assistant State's Attorneys. The Illinois Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stats. 1969, Chap. 85, § 1-101 et seq.) affords the County, as a local public entity, immunity from civil liability because of the acts of its employees done in the

execution or enforcement of any law or committed by employees serving in positions involving determination of policy or exercise of discretion. The acts alleged to have been committed by said employees were done in their capacities as persons serving in positions involving said policy and discretion. Fustin v. Board of Education of Community Unit District No. 2, 101 Ill. App. 2d 113, 242 N. E. 2d 308; Woodman v. Litchfield Community School District No. 12, 102 Ill. App. 2d 330, 242 N. E. 2d 780; Mills v. County of Winnebago, 104 Ill. App. 2d 366, 244 N. E. 2d 65.

It is, therefore, Ordered that the County of Cook, Illinois be and it hereby is dismissed as a party defendant in the Hampton, Brewer and Johnson, et al. suits wherein it is named, and that the County of Cook be and it hereby is dismissed as a party defendant in this consolidated cause.

As to the Motions to Strike and Dismiss as to Richard J. Daley, Mayor of the City of Chicago, and James B. Conlisk, Jr., Superintendent of Police of the City of Chicago.

[5] The Mayor of the City of Chicago and the City's Superintendent of Police are named as defendants in the Brewer and Johnson, et al. suits. These causes of action against these defendants cannot be maintained as they fail to state the personal, specific and factual involvement necessary to impose liability.

The civil rights statutes are premised on personal culpability, as aforesaid. The Mayor and Superintendent of Police are not charged here with any personal participation in the raid or direct infliction of injury on plaintiffs. Plaintiffs seek to hold them liable under the doctrine of *respondeat superior*. There is a lack of specificity in the complaints as to the failure of said Mayor and Superintendent to train and supervise police employees and a lack of any showing that they had any immediate supervision, direction or control of the defendants executing

the search warrant. To hold them liable under the doctrine of *respondeat superior* would be contrary to the law as decided in this District and elsewhere. Sanberg v. Richard J. Daley, Mayor of the City of Chicago, Down v. Daley and Salazar v. Dowd, all supra, and Jordan v. Kelly, 223 F. Supp. 731 (W. D. Mo., 1963).

The Mayor and the Superintendent of Police also are charged with conspiracy in allegations that there was a personal failure on their part to stop an alleged conspiracy they had the power to stop. This conclusory and general allegation is not well taken. Huey v. Barloga, 277 F. Supp. 864 (N. D. Ill., 1967).

In this court's opinion there is no showing of an act or an omission in dereliction of these defendants' public responsibility.

Accordingly, the motions of Richard J. Daley, Mayor of the City of Chicago, and James B. Conlisk, Superintendent, Chicago Police Department, to strike counts in the two complaints as to them are granted and it is Ordered that said defendants be and they hereby are dismissed as defendants in this consolidated cause in their individual and official capacities.

As to the Motions to Strike and Dismiss of Edward V. Hanrahan, State's Attorney of Cook County, and Richard S. Jalovec, James Meltreger and Sheldon Sorosky, Assistant State's Attorneys.

Plaintiffs allege various acts by the State's Attorney and three Assistant State's Attorneys in violation of plaintiffs' constitutionally protected rights. Among other things, plaintiffs allege that these defendants or some of them in their official capacities planned with others the raid upon the Monroe Street apartment and that as a result of the raid Fred Hampton and Mark Clark were killed and certain others wounded; that said defendants placed charges against some of the plaintiffs after planning with others to do so; that said defendants caused the institution of criminal proceedings against some of the plaintiffs after plan-

ning to do so with others, and that said State's Attorney and Assistant State's Attorneys continued in the alleged malicious prosecution of said charges. The State's Attorney and Assistant State's Attorneys are not charged with on-the-scene participation in the raid, which raid was conducted by certain of the other defendants.

[6] Said State's Attorney and Assistant State's Attorneys plead, among other things, their official and governmental immunity as a bar to the actions against them and their immunity from civil liability for damages arising out of the performance of their official duties. The State's Attorney and Assistant State's Attorneys were, at all times enumerated by plaintiffs, quasi-judicial officers of the State of Illinois and in the performance of their official duties. They are immune under the Illinois Tort Immunity Act, Ill. Rev. Stat. (1969), Ch. 85, § 1-101 et seq.

A part of their official duties was and is the draftsmanship of legal papers, such as a search warrant. Their official duties and responsibilities include the necessary investigation of facts and evaluation of evidence so that they can determine from such facts and evidence whether or not an offense had been committed and what offenses an accused can be charged with. Such officials are necessarily involved in the presentation of the legal aspects of a case.

[7] In their quasi-judicial character and function the State's Attorney and Assistant State's Attorneys are immune from liability herein and enjoy the same common law immunity as afforded the judiciary. This immunity has not been abrogated by the enactment of the Civil Rights Act. Bauers v. Heisel, 361 F. 2d 581 (3 Cir. 1966); Kostal v. Stoner, 292 F. 2d 492 (10th Cir. 1961); Bradley v. Fisher, 13 Wall. 335, 80 U. S. 335, 20 L. Ed. 646; Cawley v. Warren, 216 F. 2d 74 (7th Cir., 1954); Stift v. Lynch, 276 F. 2d 237 (7th Cir., 1959); Smith v. Dougherty et al., 286 F. 2d 777 (7th Cir., 1961); Agnew v. Moody, 330 F. 2d 868 (9th Cir., 1964); Wise v. City of Chicago, 308 F. 2d 364 (7th Cir., 1962).

Here, too, as to these particular defendants the court has found many of the allegations conclusory. There are not sufficient allegations made by plaintiffs that these defendants went outside their judicial or quasi-judicial capacities and engaged in investigatory conduct other than that necessary to carrying out their duties in their judicial function.

There is no factual showing of malice or lack of good faith conduct by the State's Attorney and three Assistant State's Attorneys individually or in the performance of their official duties. Nor is there a sufficient showing that their alleged acts or omissions were unreasonable under the circumstances.

The principle of granting immunity to prosecuting attorneys has been recognized in many cases. (Bauers v. Heisel and other cases, supra). As was said in Bauers, 361 F. 2d at pages 589 and 590:

> ". . . we believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent. . . . his office is vested with a vast quantum of discretion which is necesary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is afforded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself . . ."

The motions to strike and dismiss of the State's Attorney and three Assistant State's Attorneys should be granted and it is, therefore, Ordered that said Edward V. Hanrahan, Richard S. Jalovec, James Meltreger and Sheldon Sorosky be and they hereby are dismissed as parties defendant in the complaints where named and in this consolidated cause in both their individual and official capacities.

As to the Motions to Strike and Dismiss of John Mulchrone, Harry Ervanian, John Meade, Robert Kukowinski, David Purtell, Charles Koludrovic and John Sadunas.

These police officers were not part of the so-called State's Attorney's detail. They were policemen assigned either to the Crime Laboratory or the Internal Inspections Division of the Chicago Police Department. None of them are alleged to have actually participated in the raid on the apartment at 2337 W. Monroe Street, Chicago. Plaintiffs in the Brewer and Johnson, et al. cases allege the subsequent involvement of this group of policemen. Plaintiffs seek to involve them in alleged conspiracy to instigate and continue alleged malicious prosecution of plaintiffs.

Plaintiffs allege defendants Koludrovic and "Doe" examined the premises of the raid "falsely" in order to justify the version of the incident by the State's Attorney's detail; that defendants Mulchrone, Ervanian, Meade, Kukowinski and "Roe" intentionally modified procedures and limited questions put to the other policemen; that Sadunas and Purtell produced a false and misleading firearms report, and that Sadunas and Koludrovic testified falsely all to the same end.

This group is among those defendants alleged by plaintiffs to have conspired to deprive plaintiffs of equal protection of the law and their civil rights by alleged wrongful and malicious prosecution. In this court's opinion there is not set forth by plaintiffs the required degree of specificity as to what each of these policemen (not part of the detail) did to interfere with the constitutional rights of each affected plaintiff so as to impose liability. It appears to the court that plaintiffs are attempting to hold these defendants liable for the acts of persons other than themselves or for the failure of other persons to act.

[8] These defendants caused no physical injury to any of the plaintiffs. They are not liable under the doctrine of *respondeat superior*. Some had to do with the investigation of the need, if

any, to discipline any of the other defendant police officers who attempted to execute a search warrant. They had to do in various ways with the internal police department review of the conduct of the other group of police officers. This was an internal police department matter and plaintiffs were not parties thereto. As to the matter of the laboratory tests, the defendants making the tests were public employees in the exercise of a discretionary function and there is lack of specificity as to malice or lack of performance in good faith.

There is not sufficient pleading as to these defendants and lack of sufficient showing their actions caused the deprivation of any of plaintiffs' rights.

Defendants John Mulchrone, Harry Ervanian, John Meade, Robert Kukowinski, David Purtell, John Sadunas and Charles Koludrovic are hereby dismissed as parties defendant where named in these consolidated actions and it is Ordered that they be and they are hereby dismissed as party defendants in this consolidated cause in their individual and in their official capacities.

As to the Motions to Strike and Dismiss of defendant James Davis, Daniel Groth, Edward Carmody, John Ciszewski, Ray Broderick, George Jones, John Marusich, Lynwood Harris, Fred Howard, William Corbett, William Kelly, Philip Joseph, Joseph Gorman and Robert Hughes.

These police officers of the City of Chicago were detailed and/or on detached service with the Office of the Cook County State's Attorney as State's Attorney's police or detail. This group of policemen is charged in all four of the consolidated complaints with actual on-the-scene participation in the raid on the Monroe Street apartment occupied by Fred A. Hampton, Mark Clark, Verlina Brewer, Deborah Johnson, Ronald Satchel, Harold Bell, Blair Anderson, Brenda Harris and Louis Truelock. Plaintiffs charge illegal and forced entry of the apartment and the unjusti-

fiable use of excessive and deadly force by these officers acting under color of law. In the various complaints these policemen are charged with killing Fred Hampton in the presence of his fiance, Deborah Johnson, with killing Mark Clark, with wounding plaintiffs Satchel, Anderson and Harris, and with physically and verbally abusing and illegally arresting plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Truelock. They are also charged with conspiracy and conspiracy in connection with alleged and malicious prosecutions. These allegations and others are set forth in detail in the various complaints.

[9] As to certain of the allegations made in the complaints against these defendants, the court is of the opinion that there are questions of fact and of law that cannot be resolved except upon trial.

Therefore, the motions of James Davis, Daniel Groth, Edward Carmody, John Ciszewski, Ray Broderick, George Jones, John Marusich, Lynwood Harris, Fred Howard, William Corbett, William Kelly, Philip Joseph, Joseph Gorman and Robert Hughes to dismiss them as parties defendant in this consolidated cause is hereby denied.

The court is hereinafter granting plaintiffs leave to file amended complaints in this consolidated cause against these defendants and said defendants are directed to answer or otherwise plead within 20 days of the filing of said amended complaints.

Further Memorandum and Orders:

The court hereinabove having dismissed certain defendants as party defendants herein, any motions filed by the dismissed parties, such as to extend time to answer or plead, or to stay discovery, now are moot and require no ruling by the court.

The court finds the four complaints filed herein do not conform to the rules of pleading. All of the complaints are broad and contain a multiplicity of bare conclusory allegations without

any support in the facts alleged. The complaints are replete with descriptive phrases that are scandalous and irrelevant. The court has spent considerable time in an attempt to detail the counts to be stricken in so far as they relate to the parties being dismissed and to direct elimination, where proper, of those references to defendants already hereinabove dismissed from these cases. It has likewise considered the striking of the innumerable words and phrases which are scandalous and the striking of material which is irrelevant and which constitutes the pleading of alleged evidence. It finally became the court's opinion and conclusion that even if it were to set forth in voluminous detail all the counts or parts thereof that should be stricken in these complaints, in the end the original complaints would not be clearly readable, understandable and in a useable condition.

It is, therefore, Ordered that each and all of the four complaints filed herein be and they hereby are stricken in their entirety. Plaintiffs in each of the four consolidated cases are given leave to file an amended complaint (under the consolidated case number and title, No. 70 C 1384, Iberia Hampton, Administratrix, on behalf of the Estate of Fred A. Hampton, Deceased, vs. James Davis, et al.) within 30 days hereafter against those certain defendants not already dismissed herein as party defendants. Plaintiffs are Ordered to conform to the rules of pleading in their amended complaints. Defendants are given 20 days after the filing of the amended complaints to answer or plead thereto, as aforesaid.

The motions of the police officers remaining as defendants herein to stay discovery are denied. The court directs discovery to proceed in this consolidated cause except that no defendant remaining herein who is, or may be, under indictment in Cook County, Illinois, for charges related to the subject matter of these law suits, shall be required to make any answer to request for admissions, give any statement, answer any interrogatory or give his deposition, orally or in writing, herein until after the final order of the Criminal Court of Cook County has been entered

therein, including a final disposition thereof in the highest court to which such order may be appealable either directly or indirectly.

The court having completely adjudicated plaintiff's claims against certain parties defendant herein by granting their motions to dismiss and dismissing them as defendants herein, and, further, the court having expressly determined that there is no just reason for delay in entering final judgment as to them, it is hereby Ordered that final judgment be and the same is hereby entered herein dismissing the four actions of all the plaintiffs and this consolidated cause as to defendants City of Chicago; County of Cook, Illinois; Richard J. Daley, Mayor of the City of Chicago; James B. Conlisk, Superintendent of Police of the City of Chicago; Edward V. Hanrahan, State's Attorney of Cook County; Richard S. Jalovec, James Meltreger and Sheldon Sorosky, Assistant State's Attorneys; John Mulchrone, Harry Ervanian, John Meade, Robert Kukowinski, David Purtell, Charles Koludrovic and John Sadunas.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1972 — April Session, 1973

No. 72-1277
IBERIA HAMPTON, Administratrix, etc. VERLINA BREWER, etc., and DEBORAH JOHNSON, et al.,
Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, COOK COUNTY, ILLINOIS and EDWARD V. HANRAHAN, et al.,
Defendants-Appellees.

No. 72-1300
FANNIE MAE CLARK, Administratrix of the Estate of Mark Clark, Deceased,
Plaintiff-Appellant,

v.

THE CITY OF CHICAGO, EDWARD V. HANRAHAN, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

70 C 1384
70 C 3026
70 C 3029
70 C 2371

J. SAM PERRY, *Judge.*

Argued April 6, 1973—Decided August 24, 1973

Before FAIRCHILD, STEVENS and SPRECHER, *Circuit Judges.*

STEVENS, *Circuit Judge.* Plaintiffs allege that 14 Chicago police officers raided an apartment at 2337 West Monroe

Street at 4:15 A. M. on December 4, 1969, for the purpose of killing Mark Clark and Fred Hampton and punishing seven other residents of the apartment because they were black and had exercised their First Amendment rights as members of the Black Panther Party. They also allege that 15 other defendants conspired to imprison and prosecute seven surviving occupants without any legal basis whatsoever. In four separate complaints, containing a total of 49 counts, plaintiffs claim actual and punitive damages under the Federal Civil Rights Act and Illinois law. Accepting the allegations as true, as the law requires, the district court denied motions to dismiss filed by the fourteen participating officers,[1] but entered a final judgment dismissing all claims against the remaining 15 defendants. Plaintiffs appeal from that judgment.[2]

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1. With respect to the motions to strike and dismiss of defendants James Davis, Daniel Groth, Edward Carmody, John Ciszewski, Ray Broderick, George Jones, John Marusich, Lynwood Harris, Fred Howard, William Corbett, William Kelly, Philip Joseph, Joseph Gorman and Robert Hughes, the district court stated: "These police officers of the City of Chicago were detailed and/or on detached service with the Office of the Cook County State's Attorney as State's Attorney's police or detail. This group of policemen is charged in all four of the consolidated complaints with actual on-the-scene participation in the raid on the Monroe Street apartment occupied by Fred A. Hampton, Mark Clark, Verlina Brewer, Deborah Johnson, Ronald Satchel, Harold Bell, Blair Anderson, Brenda Harris and Louis Truelock. Plaintiffs charge illegal and forced entry of the apartment and the unjustified use of excessive and deadly force by these officers acting under color of law. In the various complaints these policemen are charged with killing Fred Hampton in the presence of his fiance, Deborah Johnson, with killing Mark Clark, with wounding plaintiffs Satchel, Anderson and Harris, and with physically and verbally abusing and illegally arresting plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Truelock. They are also charged with conspiracy and conspiracy in connection with alleged and malicious prosecutions [sic]. These allegations and others are set forth in detail in the various complaints. As to certain of the allegations made in the complaints against these defendants, the court is of the opinion that there are questions of fact and law that cannot be resolved except upon trial." 339 F. Supp. 695, 700-701 (N. D. Ill. 1972).

2. The district court consolidated the four cases. His order of dismissal directed the plaintiffs to file amended complaints against

The appellees include: (1) The State's Attorney (Hanrahan) and three Assistant State's Attorneys (Jalovec, Sorosky and Meltreger); (2) seven police officers who participated in certain investigations after the raid;[3] (3) the Mayor of Chicago (Daley) and the Superintendent of Police (Conlisk); and (4) the City of Chicago and the County of Cook, municipal corporations. The district court held that the prosecutors were protected by quasi-judicial immunity, that the allegations against the appellee police officers, Mayor Daley and Superintendent Conlisk were insufficient, and that the City and County were not "persons" within the meaning of the federal civil rights statutes and are immune from liability on a respondeat superior theory. In three of the cases jurisdiction stems from the federal questions which are raised; in the fourth, plaintiff Brewer is a citizen of Michigan and therefore diversity jurisdiction is also asserted.

For the purposes of this appeal we must assume that all of plaintiffs' allegations are true. The test of sufficiency is whether ". . . it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45-46.[4] Since different issues are raised with respect to different appellees, we consider the relevant allegations separately.

In view of the large number of claims asserted, and the fact that the district court order requires all pleadings to be amended,

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the 14 participating officers and expressly determined that there was no just reason for delay in entering final judgment in favor of the 15 appellees; the order is therefore appealable. The appeals have been consolidated in this court.

3. John Mulchrone, Harry Ervanian, John Meade, Robert Kukowinski, David Purtell, Charles Koludrovic and John Sadunas.

4. Despite the City's suggestion to the contrary, we must ignore what it describes as "several contradictory facts made a matter of public record" in the state criminal prosecution of defendant Hanrahan; cited at page four of the City's brief as *People* v. *Hanrahan,* Cir. Ct. of Cook County No. 71 Cr. 1791. A finding in favor of defendants in that case is clearly no bar to this action since none of these plaintiffs is a party to that judgment.

we limit our review, with respect to each appellee, to the question whether *any* sufficient claim for relief has been alleged. Since reversal as to any appellee on any theory renders the district court's other rulings respecting that appellee subject to revision at any time prior to the conclusion of the entire trial, see Rule 54(b) Fed. R. Civ. P., it would be inappropriate to discuss the sufficiency of claims which may be amended and which need not be passed upon in order to determine this appeal.

1. *Hanrahan and Jalovec.* The Hampton complaint alleges that "under color of state search warrant" 14 police officers illegally entered the residence of Fred Hampton and, without provocation, fired over 90 bullets from machineguns, pistols, shotguns and carbines into the general living quarters, critically wounding Fred Hampton, who was otherwise physically abused and ultimately died. In addition, the officers allegedly stole or damaged Hampton's personal property and destroyed evidence of their illegal conduct. These alleged acts were "perpetrated upon Fred Hampton, Chairman of the Illinois Black Panther Party, because of his beliefs, thoughts, words and associations" (¶ 21) in order "to create fear and terror in the Black Community" (¶ 23).

Hampton's administratrix alleges that Hanrahan and Jalovec, with the 14 officers, planned the raid and agreed to use excessive and deadly force against Hampton and others in his residence. Their alleged purpose was to deprive him of his constitutional rights because of his race and his political beliefs.

The Clark complaint tersely alleges that the officers shot and killed Mark Clark without any authority of law and thereby denied him due process of law by imposing summary punishment of death upon him. It alleges that defendant Hanrahan, or his Assistant State's Attorney, did "with specific intent, plan and execute the acts as alleged herein" (¶ 16); further, that these acts were the result of a tacit understanding "to treat the deceased as they did because he was Black."

The Johnson and Brewer complaints describe the raid in greater detail. They allege that four of the plaintiffs[5] were wounded by gun fire and that all of them were physically and verbally abused and illegally arrested. Again the complaints allege that Hanrahan and Jalovec, as well as the 14 officers, "wilfully, maliciously, and with specific intent planned and executed the acts" recited in the complaints. These complaints also include a number of counts alleging state law claims of false imprisonment and malicious prosecution; these charges also involve defendants Hanrahan and Jalovec but will be discussed in Part 2 of this opinion.

As the district court correctly held, the allegations are plainly sufficient to state claims against the participating officers under the Federal Civil Rights Act, 42 U. S. C. §§ 1983 and 1985(3). It is equally clear that the allegations respecting the planning and execution of the raid by Hanrahan and Jalovec are sufficient unless their prosecutorial offices gave them immunity.

The district court erroneously relied on the Illinois Tort Immunity Act.[6] Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise: and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin* v. *Tilendis,* 398 F. 2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law.

The claim of immunity must not be confused with the defense of good faith. That defense is available to a person who, either because of his position or because of his conduct, is not immune from suit. See *Pierson* v. *Ray* 386 U. S. 547, 557. In those situations in which immunity is properly claimed, the

5. Satchel, Anderson, Harris and Brewer.

6. Ill. Rev. Stat. 1969, Ch. 85, §§ 1-101, *et seq.*

action is defeated at the outset. An essential purpose of the doctrine is to give the officer freedom to exercise his discretion and to perform his official duties without fear that his conduct will be called into question at an evidentiary hearing or subject him to personal liability.

The source of the immunity is found in common law doctrine recognized in federal judicial decisions. The Supreme Court has squarely held that the broad language of the Civil Rights Act of 1871 did not abolish this protection for legislators "acting in a field where legislators traditionally have power to act," *Tenney* v. *Brandhove*, 341 U. S. 367, 379, or for judges for acts "within their judicial jurisdiction . . . even when the judge is accused of acting maliciously and corruptly. . . ." *Pierson* v. *Ray*, 386 U. S. 547, 554.[7] With respect to legislators and judges, it is clear that the doctrine may not be circumvented by allegations of improper motive; rather, the availability of immunity depends on the character of the conduct under attack.

The scope of immunity enjoyed by a state prosecutor has not yet been defined by the Supreme Court. We are nevertheless confident that at least some of his traditional functions must be immune from suit under § 1983. See *Littleton* v. *Berbling*, 468 F. 2d 389, and cases cited at page 409 (7th Cir. 1972). In

7. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' Scott v. Stansfield, L. R. 3 Ex 220, 223 (1868), quoted in *Bradley* v. *Fisher, supra*, 349, note, at 350). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Id.* at 553-554.

view of the overriding importance of federal law, the area of his protection cannot be either limited or expanded by a state's statutory definition of his authority or responsibility; we therefore do not pause to review the respective parties' analyses of the relevant Illinois statute.[8] Nor do we attach any weight in analyzing the immunity question to the numerous ways in which the pleadings characterize the motivation of the prosecutor as wrongful—ranging from "sadistic" or "racial" to the more familiar "malicious" or "discriminatory." The immunity doctrine would be of little value if such characterization of his motive could force the prosecutor to stand trial.

Prosecutorial conduct which traditionally has been treated as immune is often described as "quasi-judicial" as opposed to investigatory activities normally performed by laymen, such as police officers. Judge Ely's exposition of the distinction in *Robichaud* v. *Ronan*, 351 F. 2d 533 (9th Cir. 1965) properly focuses on the character of the defendant's conduct, rather than his alleged motivation:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? See Monroe v. Pape, supra, 365 U. S. at 187, 81 S. Ct. 473; see also Schneider v. Shepherd, 192 Mich. 82, 158 N. W. 182, L. R. A. 1916F, 399 (1916), cited in Yaselli, 12 F. 2d at 405. To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Id.* at 536-537.

The conduct of Hanrahan and Jalovec in planning the raid may be described in various ways. At one extreme the complaints may be read to charge that they deliberately planned

8. See Ill. Rev. Stat. Ch. 14, § 5.

to have the police officers kill Hampton and Clark. Even without the allegation of improper political or racial motivation, it is plain that no immunity would apply under that reading. Regardless of his motives, the prosecutor certainly may not order subordinates to kill or to punish a free citizen without trial. Notwithstanding the tone of these complaints, however, appellants have not urged this extreme reading on the court; we therefore do not so interpret the allegations.

At the other extreme, defendants Hanrahan and Jalovec argue that they are charged with nothing more than the drafting of a search warrant which the raiding officers executed, an act which should be accepted as a traditional duty of the Attorney for the County. But we are persuaded that the "planning" allegations cannot fairly be read so narrowly. At the very least they charge that Hanrahan and Jalovec planned a raid in order to obtain evidence of criminal activity. Defendants argue that evidence gathering is so closely related to the presentation of evidence at trial that it should also be clothed with immunity. We find this argument unpersuasive. Even though defensible if conducted in good faith with probable cause, the State's Attorney's alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.

The district court erred in holding that the immunity doctrine requires dismissal, without trial, of plaintiffs' charges against defendants Hanrahan and Jalovec.

2. *Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, Sadunas, Sorosky and Meltreger.* The Johnson and Brewer complaints also allege that nine appellees, including seven police officers and two additional Assistant State's Attorneys, joined with Hanrahan and Jalovec and the 14 participating officers in an extensive conspiracy to cause the false arrest and imprisonment of the surviving plaintiffs, the institution of an unfounded prosecution, and the concealment of the truth from the public.

Several of the plaintiffs were arrested on December 4, 1969, charged with attempted murder and aggravated battery, and imprisoned until December 21, 1969; their prosecutions were continued until May 8, 1970. They allege that there was no legal basis for the arrests, the charges, or the imprisonment. Quite plainly, if the allegations are true, § 1983 authorizes relief against each person who, acting under color of state law, is responsible for these wrongs. Moreover, the conspiracy which they allege is also actionable under § 1985(3). We are satisfied that the post-raid charges against Hanrahan, Jalovec and the 14 police officers are sufficient under both § 1983 and § 1985(3). The sufficiency of the charges against the other defendants is less clear.

The complaints charge that these defendants took certain action designed to conceal the fact that there was no basis for arresting, holding or prosecuting the plaintiffs, and that the continuing concealment aggravated plaintiffs' injuries. Thus, Mulchrone and Ervanian, Supervising Officers of the Internal Inspections Division of the Chicago Police Department, allegedly limited the scope of their investigations in order to prevent information contradicting the participating officers' version of the raid from coming to light. Defendant Meade prepared a set of questions and answers for the officers that would avoid a fair test of their veracity. Defendants Sorosky and Meltreger helped to edit these questions and answers.[9] Defendants Sadunas and Koludrovic gave false testimony at the coroner's inquest. Sadunas allegedly gave testimony before the grand jury which he knew to be false. Defendants Purtell and Sadunas allegedly filed an incomplete and erroneous firearms report—again to corroborate the official, but false, version of the raid.

9. The purpose of the review was allegedly to make certain that the officers would not give testimony inconsistent with previous official statements about the incident. The alleged conduct of Assistant State's Attorneys Sorosky and Meltreger clearly exceeded the scope of their *quasi-judicial* immunity. For, in substance, plaintiffs allege the deliberate preparation of perjured testimony.

The complaints allege that as a direct result of the conspiracy, the unfounded prosecution was continued until May 8, 1970, and plaintiffs incurred expenses in preparing their defense. The conspiracy charge is somewhat tenuous since it merely alleges that "some or all" of the defendants participated, and the causal connection between the conduct of several appellees and the alleged injury to plaintiffs is doubtful at best. Nevertheless, serious allegations of conspiracy have been made, and matters such as the extent of injury and causal connection raise questions for the trier of fact. Since we cannot say with certainty that there is no possibility that any set of facts which might be proved in support of the allegations would entitle one or more of the plaintiffs to some relief, it was error for the district court to enter judgment finally disposing of the claims against these defendants.

If the alleged conspiracy did exist, as we must assume at this stage of the case, and if it did prolong a completely unfounded prosecution, plaintiffs are entitled to relief against each conspirator. The vague allegation that "some or all" of the defendants were participants does not justify requiring them all to stand trial. But if *some* are in fact liable, it would be unjust to permit a final judgment to exonerate all before trial, or even discovery, has commenced. We therefore conclude that even if the charges against certain of the defendants may have been properly dismissed because the allegations were deficient, it was error to enter final judgment in favor of Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, Sadunas, Sorosky and Meltreger at this stage of the case.

3. *Daley and Conlisk.* In the Johnson and Brewer complaints, plaintiffs claim that Mayor Daley and Superintendent Conlisk are liable pursuant to 42 U. S. C. § 1986 for the consequences of the alleged conspiracy.[10] The charge, in es-

10. Section 1936 provides:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent

sence, is that they had the power and authority to prevent a violation of § 1985(3) by the other defendants and failed to do so. Liability under § 1986, however, is dependent on proof of actual knowledge by a defendant of the wrongful conduct of his subordinates. In their brief, plaintiffs summarize the critical charges against Daley and Conlisk by stating that the complaints allege "that due to their positions of authority and responsibility, [they] knew of the conspiracy against the plaintiffs." Brief for Appellants at 43. We agree with the district court that those allegations are insufficient.

4. *City of Chicago and County of Cook.* The several claims against the City and the County under the Civil Rights Act were properly dismissed because these defendants are not "persons" within the meaning of the statute. See *Moore* v. *County of Alameda*, ... U. S. ...., 41 U. S. L. W. 4627, 4629-4632 (May 14, 1973). That decision makes it clear, however, that the district court had jurisdiction over Brewer's state law claims against the County, and presumably the City as well, on the basis of diversity of citizenship. 41 U. S. L. W. at 4634-4636.

Those claims, asserted in Counts 13, 14 and 15 of the Brewer complaint, allege common law torts of assault and battery, false imprisonment, and malicious prosecution. The district court held that these claims against the County are barred by the Illinois Local Governmental and Governmental Employees

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or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

Tort Immunity Act, Ill. Rev. Stat. Ch. 85, §§ 1-101, *et seq.* The district court relied primarily on *Mills* v. *County of Winnebago*, 244 N. E. 2d 65 (2d Dist. 1969).[11] Subsequent to the decision of the district court, that case was overruled *sub silentio* by *Arnolt* v. *Highland Park*, 282 N. E. 2d 144 (1972). See *Krieger* v. *Carpentersville*, 289 N. E. 2d 481, 484 (2d Dist. 1972). As we read those cases, it now seems quite clear that the Illinois statute does not immunize municipal corporations from liability if their agents are guilty of wilful and wanton misconduct. The allegations in the Brewer complaint against the City of Chicago and Cook County are therefore sufficient.

The district court dismissed parallel state law claims in the Johnson complaint on the same grounds. However, there was no diversity of citizenship in that case, and this court ruled in *Wojtas* v. *Village of Niles*, 334 F. 2d 797 (7th Cir. 1964), that the doctrine of pendent jurisdiction does not permit joinder of claims against a new party. Therefore, the dismissal of the state law claims in the Johnson complaint should be for want of jurisdiction, and the lower court's order is appropriately modified.

Insofar as the district court's order of February 3, 1972, dismissed the charges against the City of Chicago and the County of Cook, it is reversed with respect to the Brewer complaint and affirmed as modified with respect to the Johnson complaint; insofar as it dismissed the charges against Mayor Daley and Superintendent Conlisk, it is affirmed; insofar as it dismissed the charges against defendants Hanrahan, Jalovec, Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, Sadunas, Sorosky and Meltreger, it is reversed. The case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

11. It also cited *Fustin* v. *Board of Education of Community Unit District No. 2*, 242 N. E. 2d 308 (5th Dist. 1968), and *Woodman* v. *Litchfield Community School District, No. 12*, 242 N. E. 2d 780 (5th Dist. 1968).